DOJ Merger Challenge Highlights Danger Of Bad Documents

Law360, New York (January 15, 2013, 12:38 PM ET) -- The U.S. Department of Justice has filed an antitrust lawsuit challenging a June 2012 transaction combining two providers of product rating and review platforms (PRR platforms) used to collect and display consumer-generated online product feedback. This lawsuit highlights how merging parties’ “hot” documents can attract significant interest from the antitrust agencies and, if damaging enough, even lead to merger challenges. This lawsuit also serves as a reminder that U.S. antitrust enforcers can challenge mergers even after closing, and even for deals not subject to premerger notification under the Hart-Scott-Rodino Act.

The complaint alleges that the acquisition of PowerReviews Inc. by Bazaarvoice Inc. is likely to substantially lessen competition for PRR platforms used by U.S. retailers and manufacturers. The DOJ charged that Bazaarvoice was the leading commercial supplier of PRR platforms with PowerReviews being its closest competitor by a wide margin. According to an annual ranking of the largest Internet retailers in the U.S., approximately 70 percent of these retailers used a PRR platform provided by one of the parties. According to the DOJ, most of the remaining websites used in-house PRR solutions. For many retailers, in-house solutions did not provide a meaningful constraint on the parties’ pricing given the significant cost of building such an internal platform.

The DOJ also alleged that PowerReviews had positioned itself as the low-price alternative to Bazaarvoice and the parties’ fierce competition led to innovation and new PRR platform features. Thus, according to the DOJ, the combination eliminated price competition as well as Bazaarvoice’s incentives to innovate.

To support its allegations, the DOJ filled its complaint with numerous quotes from internal company documents emphasizing how the deal would reduce competition. For example, a memorandum to the Bazaarvoice board of directors, asserted that the acquisition would “eliminate[e] feature driven one-upmanship and tactical competition,” “[c]reate[] significant competitive barriers to entry;” “eliminate the cost in time and money to take [PowerReviews’] accounts;” and “reduce [Bazaarvoice’s] risk of account losses as [PowerReviews] compete[d] for survival.”

Other quotes in the DOJ complaint indicated that the acquisition would:

- “tak[e] out [Bazaarvoice’s] only competitor, who ... suppress[ed] [Bazaarvoice] price points []by as much as 15%”;
- “[e]liminate [Bazaarvoice’s] primary competitor” and “reduc[e] comparative pricing pressure”; and
- “block[] entry by competitors” and “ensure [Bazaarvoice’s] retail business [was] protected from direct competition and premature price erosion.”
The DOJ’s reliance on internal company documents should remind parties of the need for caution and restraint in what they say about a target or potential transaction. “Hot” documents can be crucial to the outcome of any antitrust matter and company executives should avoid exaggerations or overstatements, particularly on competitively sensitive issues such as market definition and market share.

In addition, this DOJ challenge demonstrates that neither a consummated nor a nonreportable transaction is immune from antitrust scrutiny. The parties to this transaction were not required to submit HSR premerger notification forms because they did not meet the size of person test. Nevertheless, the DOJ began investigating the transaction shortly after it closed, presumably after receiving complaints from customers. A successful government challenge to a consummated merger can be particularly onerous because it may require an entity that has already started integrating the acquired business to “unscramble the eggs” as part of a court ordered divestiture.

Nevertheless, this lawsuit is a reminder that the U.S. antitrust agencies will not hesitate to challenge consummated transactions and tackle all of the complexity involved in “unscrambling the eggs” where they believe there has been harm to competition and consumers.

The complaint was filed on Jan. 10, 2013, in the U.S. District Court for the Northern District of California.

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